88-2089

NO.

Supreme Court, U.S.
FILED
MAY 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1988

OLYMPIA ROOFING COMPANY, OLYMPIA COMPANY, INC., W. J. MANION, TRAILER-TRUCK BODIES, PARTS and SERVICE, INC., WEATHERCAP INC., OLYMPIA SUPPLY COMPANY, INC. and ESTATE OF MARTHA M. AUGUSTIN
Petitioners

v.

C. ELLIS HENICAN AND LAW OFFICE OF HENICAN, JAMES & CLEVELAND
Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOURTH CIRCUIT STATE OF LOUISIANA NO. CA-8908

ORIGINAL PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioners

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QUESTIONS PRESENTED FOR REVIEW

1. Original complaint alleged C. Ellis Henican ("Mr. Henican"), defendant/apellee/Trustee, testified falsely at trial on March 4, 1976. Fourth Amended Petition stipulated that Mr. Henican's testimony was not false, but Petition alleged Mr. Henican breached his fiduciary duties owed to plaintiff-appellants, Mrs. Martha Augustin ("Mrs. Augustin") and W. J. Manion ("Mr. Manion"). All State Courts have failed and refused to address the issue of breach of fiduciary duty owed by a Trustee in contravention of Louisiana Code of Civil Procedure, Acts 699 and 742.

2. Title to Olympia Roofing Company, Inc. stock was vested in Mr. Henican; he was proper person to sue City of New Orleans for breach of contract, thereby asserting the lawful rights of the Trust. LSA-R.S. 9:1781. Mr. Henican refused to represent petitioners in litigation againsts City of New Orleans, but he did negotiate for a period in excess of one year to get sale of Square 642 ratified by the City of New Orleans.

3. Trustee possessed the power to sell Trust property as there was no prohibition thereto. LSA-R.S. 2119; *Succession of Carriere,* 216 So.2d 616 (La.App. 4 Cir. 1969). Mr. Henican compounded the problem by selling Square 643 to Perry-John Realty, Inc. by Olympia *Roofing* Company, Inc. when Olympia *Company*, Inc. was the only viable legally constituted corporation with title to Square 643. (Appendix F and K)

4. Actual title to Square 642 and 643 and corporate stock of Olympia Roofing Company, Inc. was transferred from settlor, Mrs. Augustin, to Mr. Henican as Trustee and not to the beneficiary (Mr. Manion). Beneficiary of Trust may assert legal action against Trustee for breach of

fiduciary obligation. *Succession of Hines*, 341 So.2d 42 (La.App. 3 Cir. 1977)

None of the aforementioned material issues of fact were addressed by State courts below, which violated constitutional guaranties against loss of *property*, liberty and due process protected by United States Constitution, Fourteenth Amendment. *Huber v. Calcasieu Marine National Bank of Lake Charles*, 262 So.2d 404 (La.App. 3 Cir. 1972)

LIST OF PARTIES AND OTHERS

Pursuant to Supreme Court Rules 21.1(b) and 28.1, counsel for the Petitioners certifies that the following list of persons or corporations either have an interest in the outcome of this case or were parties to the proceeding in the Court whose judgment is sought to be reviewed.

Petitioners/Plaintiffs/Appellants

Olympia Roofing Company, Olympia Company, Inc., W. J. Manion, Trailer-Truck Bodies, Parts and Service, Inc., Weathercap Inc., Olympia Supply Company, Inc. and Estate of Martha M. Augustin.

Respondents/Defendants/Appellees

C. Ellis Henican, Trustee and Law Office of Henican James & Cleveland

OTHERS:

Clerk, Civil District Court, Parish of Orleans, State of Louisiana

Clerk, Louisiana Court of Appeals for the Fourth Circuit

Clerk, Supreme Court of Louisiana

Hon. Revius O. Ortique, Jr., Judge

W. J. MANION,
individually and attorney of
record for Petitioners'.
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I.

The petitioners, Olympia Company, Inc., Olympia Roofing Company, and their undersigned counsel, W. J. Manion, respectfully pray that a Writ of Certiorari issue to review the final order of the Court of Appeals Fourth Circuit, State of Louisiana, entered in the above entitled proceedure on October 11, 1988; rehearing denied December 14, 1988. (Appendix C).

JUDGMENTS AND OPINIONS BELOW

Summary Judgment was rendered on May 11, 1987 (Appendix A-2); motion for new trial was denied on June 8, 1987 (Appendix A-5); District Court Judgment was affirmed by State of Louisiana, Court of Appeals for the Fourth Circuit, on October 11, 1988, with sanctions plus costs being assessed for frivolous appeal (Appendix A-7); Supreme Court of Louisiana denied Writ of Certiorari on February 17, 1989 and denied reconsideration of application for Writ on March 27, 1989 (Appendix D and E 15 and 16)

JURISDICTION
(S.Ct. Rule 15; 12.3)

The following statutes and constitutional guaranties set forth the jurisdiction necessary to lodge this Writ of Certiorari:

28 U.S.C.A. 2101 (C)
Rule of the Supreme Court, Rule 17(C)
U.S.C.A. Const. Amend. 14
LSA-C.C.P. art. 699
LSA-C.C.p. art. 742
LSA-R.S. 9:1781
LSA-R.S. 9:2119

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

(a) *Fourteenth Amendment, United States Constitution:*

No state shall deprive "any person of life, liberty or property without due process of law" and "equal protection of the law".

STATEMENT OF THE CASE

In September, 1955, Mrs. Augustin designated Mr. Henican to be testamentary notary for, and executor of, her estate, which instrument refers to a buyout agreement between Mrs. Augustin and her son, Mr. Manion, of her interest in Olympia Roofing Company, Inc. *("Roofing").* Mr. Henican was designated as Trustee of her property and stock of *Roofing* as of September 30, 1955; this agreement was further supplemented on February 14, 1962, January 15, 1965, March 24, 1965, and until her death in late 1976. Trustee Henican was Olympia's *Roofing's* and *Company's* and Mrs. Augustin's personal attorney of record.

Roofing purchased Square 642 from an agency of the City of New Orleans on June 23, 1968. On March 27, 1969 *Roofing's* name was changed to Olympia Company, Inc. *("Company")* (Appendix F). Since all performance contracts were in the name of *Roofing,* Mr. Henican was asked to clarify Olympia's status, and on April 3, 1969, his explanation (Appendix G) did not conform with the written name change stated in notarial act (Appendix F).

Sale of Square 642 was declared a nullity, and on August 11, 1962, *Roofing* (not *Company)* sued City of New Orleans for breach of contract. Proportional share ownership of corporate stock of Olympia was discussed with Mr. Henican and his associate, Mrs. Walker (Appendix H), with

final resolution being submitted by Mr. Henry Guidry ("Mr. Guidry") on September 26, 1975. Stock in the name of *Company* was not issued or exchanged as agreed, nor did Mr. Henican ever have in Trust possession any *Company* stock. The Stock he possessed was *Roofing* which was stale and void as of March 27, 1969.

On December 15, 1975 (less than 3 months after stock ownership determination had been submitted by Mr. Guidry), *Roofing* sold Square 643 to Perry-John Realty, Inc. (Appendix K) with Mr. Henican's approval since he submitted a statement (Appendix J) for reviewing corporate resolution of *Roofing,* suggested changes, and was physically present at the act of sale.

Mr. Henican was noticed for trial as Olympia's initial witness againsts City of New Orleans for brreach of contract. On March 4, 1976, Mr. Henican stated under oath that *Company* was the only viable corporation and not *Roofing* since name change on March 27, 1969.

In his capacity as Trustee, Olympia's trial counsel was told to drop litigation and take no procedural steps to correct improper party plaintiff designation error. Subsequent to dismissal of litigation againsst City of New Orleans, Mr. Henican was requested to surrender Olympia stock. He had only *Roofing* stock; *Company* stock had never been issued after name change of March 27, 1969. Upon this disclosure, a legal malpractice action was initiated against Mr. Henican. This action has been reviewed by all State Courts and deemed frivolous. Since Trust Code is sui generis, it is difficult to accept any rationalization supporting summary judgment dismissal.

Appellate Court had labeled Henican litigation as frivolous and has levied sanctions based on a "history" of

Mr. Manion's pursuit of frivolous litigation following judgment of United States Court of Appeals for the Fifth Circuit in an antitrust case styled "Olympia Roofing Co., Inc. v. Celotex Corporation". No. 76-373A, United States District Court, Eastern District of Louisiana, which case is submitted for Writ of Certiorari to United States Supreme Court based on constitutional violation of Amendments 4 and 5.

REASON FOR GRANTING THE WRIT

Mrs. Augustin, as both settlor and beneficiary of Trust during her lifetime, had a right to institute a cause of action against Mr. Henican, Trustee, for breach of fiduciary duty owed. *This cause of action was a property right.* Upon her death, those rights were acquired by her legal and testamentary heir by seizen under LSA-C.C. art. 940 & 943. Since Trust Code is sui generis, any allegation of Trust Code abuses should have been considered by the Court separately, consistent with the Fourth Amended Petition.

The "Touchstsone" of procedural due process is protection of the individual against arbitrary action of government or their officers, *Wolff v. McDonnell,* (1974) 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 4 L.Ed.2d 935, thereby minimizing efficiently their risk of arbitrary or erroneous deprivations of life, liberty or property.

Mr. Henican should have initiated and prosecuted the breach of contract action against the City of New Orleans. Prior thereto, he was active for some 18 months trying to get the City of New Orleans to ratify the sale of Square 642. There is no question that Mr. Henican failed to serve as a Trust fiduciary - simply stated, he possessed all stock that was issued *(Roofing)* and never issued new stock of the viable corporation in the name of *Company.* LSA-C.C.P. art. 699; LSA-R.S. 92:2222

State Courts have abused constitutional guaranties provided by Fourteenth Amendment, and under statutory authority cited herein, it was manifest error or cleraly wrong to grant Summary Judgment dissmissal with such important issues of material fact unresolved thereby denying legal determination of issues as set forth in Fourth Amended Petition (Appendix I), *Huber v. Calcasieu Marine National Bank of Lake Charles,* 262 So.2d 404 (La.App. 3 Cir. 1972)

The penal provisions of LSA-C.C.P. art. 2164 are invoked only when it manifestly appears that the appeal was taken solely for the purpose of delay or harassment. *Bellard v. Safeway Ins. Co.,* 442 So.2d 1314 (La.App. 3 Cir. 1983); *Brasseaux v. Reaux,* 394 So. 2d 688 (La.App. 3 Cir. 1981); *Redding v. Cade,* 158 So.2d 880 (La.App. 3 Cir. 1963) Under legal concept of mitigation, Olympia was required to exhaust all legal means against City of New Orleans before pursuing claim for damages from Mr. Henican. Trier below was required to first determine liability of City of New Orleans for consequences of null sale to *Roofing.* Once that was decided, liability of Mr. Henican et al would be addressed therefore to render Summary Judgment in favor of Mr. Henican et al was premature and improper. Plaintiffs and their counsel truly believe in the merit of their claim against Mr. henican in the negligence and breach of fiduciary duty he owed as a Trustee.

District Judge denied Olympia a new trial. Summary Judgment was granted defendants. The District Court below would not address the issue of Trusteeship; Court ignored Mr. Henican's deceptive conduct and misrepresentations. District Court denied Mr. Henican had any responsibility for examining instruments relative to the Perry-John Realty, Inc. act of sale (Appendix K). It is urged that such a ruling by District Judge is clearly wrong as Mr. Henican was paid for his services. *Arcenaux v.Domingue,*

365 So.2d 1330; *American Guaranty Co. v. Sunset Realty & Planting Co.*, 23 So.2d 409, 449 (La. 1945)

It is submitted that District Judge misread *Crawford v. Green and Assoc.*, 493 So.2d 734 (La.App. 2 Cir. 1987), which dealt with attorney's breach of duty owed client. Mr. Henican had a duty to examine indices of public record to determine, prior to trial, the proper corporate entity of Olympia if he could not establish that proof from his own office files. *Crawford v. Green and Assoc.*, 493 So.2d 734 (La.App. 2 Cir. 1987)

Stigmatization of Mr. Manion has occurred from imposition of sanctions and penalties. Mr. Manion has been cast as an inept attorney, prone to filing frivolous and irresponsible litigation. the geneais for this assumption is antitrust case summary judgment dismissal reported in 771 F.2d 888, 893 (U.S.C.A. 5 Cir. 1987) wherein Mr. Manion's brief was submitted without benefit of 5 boxes of exhibits that were illegally searched and retained by Federal personnel. Writ of Certiorari to United States Supreme Court has been requested to remand that litigation based on violations of Fourth and Fifth Amendment of the United States Constitution.

CONCLUSION

F.R.C.P. Rule 61, 28 U.S.C.A., sums up Petitioner's position wherein the Courts at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantive rights of the

parties. If constituted rights are violated and affected, remand and new trial is mandatory. For the foregoing reasons, it is urged that Writ of Certiorari be issued.

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Attorney for Petitioners

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing original brief of petitioners has this _____ day of _____, 1989 been mailed to interested parties and counsel of record.

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(504) 649-4000
La. Bar No. 9089
Attorney for Petitioners

APPENDIX A

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 77-3453 DIVISION "H" DOCKET NO.

OLYMPIA ROOFING CO., INC.,
OLYMPIA COMPANY, INC.
TRAILER TRUCK BODIES, PARTS & SERVICES, INC., ET AL

versus

C. ELLIS HENICAN, SR., ET AL

CONSOLIDATED WITH

NO. 85-00197 DIVISION "H" DOCKET NO.

OLYMPIA ROOFING CO., INC.
OLYMPIA COMPANY, INC.
TRAILER TRUCK BODIES, PARTS & SERVICE, INC.
W. J. MANION, and
ESTATE OF MARTHA M. AUGUSTIN, Plaintiffs

versus

CITY OF NEW ORLEANS,
Through its Mayor and City Councilmen,
UNION PASSENGER TERMINAL COMMITTEE, et al; and,
in the alternative,
C. ELLIS HENICAN, SR., and
LAW OFFICE OF HENICAN, JAMES & CLEVELAND,
Defendants

FILED:_____ _____
DEPUTY CLERK

A-2

JUDGMENT

This matter came for hearing on a Motion for Summary Judgment filed by the defendant. The matter was fully argued by the plaintiff in proper person who addressed issues not pleaded in addition to those which were pleaded. The basic thrust of plaintiff's case is that the name of a corporation involved in litigation before this Court was misrepresented by the defendant. The plaintiff admits that the defendant was not handling this litigation for the corporation at the time. Further the plaintiff admits that no transcript exists which reflects any reason why that litigation was dismissed. Such dismissal was not appealed nor were any post-dismissal remedies requested. The Court has reviewed the company affidavits and is convinced that Summary Judgment should be granted in this matter.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion for Sumary Judgment made on behalf of C. Ellis Henican Sr. and the law firm of Henican, James & Cleveland is hereby granted. Plaintiffs' suit in docket no. 77-3453 is hereby dismissed in toto with full prejudice and with plaintiffs to bear all costs of the litigation. Plaintiffs' suit in docket no. 85-00197 is hereby dismissed with full prejudice as to all claims asserted therein against C. Ellis Henican and against the firm of Henican, James & Cleveland and plaintiffs are to bear all costs of that lawsuit.

JUDGMENT READ, RENDERED AND SIGNED in New Orleans, Louisiana this **11th** day of **May** , 1987.

/s/ Revius O. Ortique, Jr.

J U D G E

Approved: May 11th 1987

/s/ illegible
COMMISSIONER AND JUDGE AS HOC

The sheriff is to serve a certified copy of this Judgment and a Notice of Signing of this Judgment on:

Olympia Company, Inc.
Olympia Roofing Company, Inc.
Trailer Truck Bodies, Parts & Service, Inc.
W. J. Manion
Estate of Martha M. Augustin
through their attorney of record:

W. J. Manion
P. O. Box 1776
Slidell, Louisiana 70459

APPENDIX B

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 77-3453 DIVISION "H" DOCKET NO.

OLYMPIA ROOFING CO., INC.,
OLYMPIA COMPANY, INC.
TRAILER TRUCK BODIES, PARTS & SERVICES, INC., ET AL

versus

C. ELLIS HENICAN, SR., ET AL

CONSOLIDATED WITH

NO. 85-00197 DIVISION "H" DOCKET NO.

OLYMPIA ROOFING CO., INC.
OLYMPIA COMPANY, INC.
TRAILER TRUCK BODIES, PARTS & SERVICE, INC.
W. J. MANION, and
ESTATE OF MARTHA M. AUGUSTIN, Plaintiffs

versus

CITY OF NEW ORLEANS,
Through its Mayor and City Councilmen,
UNION PASSENGER TERMINAL COMMITTEE, et al; and,
in the alternative,
C. ELLIS HENICAN, SR., and
LAW OFFICE OF HENICAN, JAMES & CLEVELAND,
Defendants

FILED:_____ _____
DEPUTY CLERK

JUDGMENT

This matter came on for hearing on Friday, June 5, 1987 upon motion for New Trial filed on behalf of plaintiffs. Present were:

WILLIAM J. MANION,
Attorney for Plaintiffs

AND

JACK M. ALLTMONT,
Attorneys for C. Ellis Henican and
the law firm of Henican, James & Cleveland

The court having considered the pleadings, the law, the evidence, the memoranda and arguments of counsel, and being of the opinion that the Motion for New Trial is without merit:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion for New Trial filed by and on behalf of plaintiffs, Olympia Roofing Company, et al be and it is hereby denied with all costs assessed against plaintiffs.

CDC #77-3453 and 83-00197
OLYMPIA ROOFING, ET AL -vs- C. ELLIS HENICAN, ET AL
JUDGMENT (page 2 of 2)

JUDGMENT RENDERED in open court with both counsel present on June 5, 1987. Judgment signed on June 8, 1987 at New Orleans, Louisiana.

/s/ Revius O. Ortique, Jr.
REVIUS O. ORTIQUE, JR., JUDGE

PLEASE SERVE:
This Judgment and Notice of Signing of Judgment on:

Olympia Roofing Company, et al
through their attorney of record
William J. Manion
P. O. Box 1776
Slidell, Louisiana 70459

Mail copy of Judgment to:

Jack M. Alltmont
Sessions, Fishman, Rosenson,
Boisfontaine, Nathan & Winn
3500 Place St. Charles
201 St. Charles Avenue
New Orleans, Louisiana 70170

APPENDIX C

OLYMPIA ROOFING CO., INC. CA-8909
OLYMPIA COMPANY, INC. TRAILER
TRUCK BODIES, PARTS COURT OF APPEAL
AND SERVICE, INC., ET AL
FOURTH CIRCUIT

VERSUS

C. ELLIS HENICAN, SR. AND STATE
LAW OFFICE OF HENICAN, OF
JAMES & CLEVELAND LOUISIANA

AN APPEAL FROM THE CIVIL DISTRICT COURT, PARISH OF ORLEANS NO. 77-3453, DIVISION "H", HONORABLE REVIUS O. ORTIQUE, JR., JUDGE

* * * * * * * * * * * * * *

WILLIAM H. BYRNES, III
JUDGE

* * * * * * * * * * * * * *

(Court composed of Judges William H. Byrnes, III, David R. M. Williams, and Steven R. Plotkin)

OCT 11 1988

SESSIONS, FISHMAN, ROSENSON,
BOISFONTAINE, NATHAN & WINN
JACK M. ALLTMONT
New Orleans, Louisiana
Attorneys for Defendants-Appellees

W. J. MANION
P. O Box 1776
Slidell, Louisiana
Attorney for Plaintiffs-Appellants

AFFIRMED

Appellants, Olympia Company, Inc. Olympia Roofing Company and Trailer Truck Body Parts and Service Inc., brought this negligence action alleging that the testimony of appellee, C. Ellis Henican, during a lawsuit previously brought by Olympia Roofing Company, Inc. against the City of New Orleans, caused the dismissal of that lawsuit. We affirm the district court's granting of appellees' Motion for Summary Judgment. Further, because we find this appeal to be frivolous we assess $2,500.00 as damages, plus court costs, against appellants and their appellate attorney.

FACTS

This appeal arises out of two lawsuits filed by appellants. The first, filed in 1977, contained allegations by appellants against Mr. Henican Concerning the allegedly false testimony he gave in an earlier suit brought by Olympia Roofing Company Inc. against the City of New Orleans and the UPT. It was alleged that, at the trial of this earlier matter Mr. Henican testified that the proper name for the plaintiff in that action was Olympia Company, Inc. not Olympia Roofing Company, Inc. Subsequently, that suit was dismissed for failure to name the proper party plaintiff. Appellants herein contend that the dismissal in the earlier suit against the City was due to Mr. Henican's allegedly false testimony regarding the correct name of Olympia. Rather than cure the relatively minor defect in the prior suit by amending the petition or appealing the judgment of dismissal, appellants instead filed suit in 1977 against Mr. Henican. With the exception of four amending petitions the 1977 suit remained inactive for seven years until Mr. Henican filed a Motion for Summary Judgment in 1984. The Judge referred the Motion to the merits and set the case for trial before a Commissioner on March 15, 1985. Prior to this trial date appellants filed a second suit

attempting to revive its previously dismissed claims against the City and the UPT. The 1985 suit also realleged the claims against Mr. Henican as an alternative to recovery from the City and the UPT.

Both suits were apparently consolidated and in March, 1987 Mr. Henican re-urged his previously filed Motion for Summary Judgment. The Motion was heard in April, 1987 before a Commissioner. The Commissioner recommended granting the Motion which recommendation was adopted by the District Court on May 1, 1987. The Judgment was amended, due to an apparent clerical error, to reflect that the dismissal of appellants' claims against MR. Henican was effective as to both the 1977 and 1985 suits, as consolidated. Appellants' Motion for a New Trial was denied and this appeal followed.

LAW

Louisiana Code of Civil Procedure Article 966(b) provides in pertinent part, as follows:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." (emphasis added)

It is well settled that summary judgment should only be granted when reasonable minds must inevitably concur that there exist no genuine issues of material fact. *Whitney v. Maltet,* 442 So.2d 1361 (La. App. 3rd Cir. 1983), *writ den* 445 So.2d 437. All reasonable doubts as to the propriety of the summary judgment are to be resolved against granting the motion and in favor of trial on the merits.

American Bank & Trust Co. v. Sunbelt Environmental Systems, Inc., 451 So.2d 1111 (La. App. 1st. Cir. 1984); *Other v. Sharp Electric, Inc.*, 451 So.2d 1235 (La. App. 4th Cir. 1984). In considering the motion the trial court should look to the pleadings, depositions and other documents of record to determine the existence of a genuine issue of material fact. *Otter v. Sharp Electric, Inc., supra; Kerwin v. Nu-Way Construction Service, Inc.*, 451 So.2d 1195 (La. App. 5th Cir. 1984). Additionally, it has been held that one purpose of the summary judgment is to dispose of frivolous claims. *Schaefer v. Lynch*, 406 So.2d 185 (La. 1981). Although summary judgments are not generally favored we have reviewed few, if any, cases more deserving of summary disposition than the case at bar.

After sifting through appellants' "brief" and separating out the primarily superfluous and purely vindictive statements it is abundantly clear that the only material fact in this lawsuit concerns set out many other supposedly material facts, it is solely the allegedly false testimony of the attorney that forms the entire basis for the case before this court.

William J. Manion, who is not only appellants' attorney, but, also the President of Olympia Company, Inc. testified unequivocally that as President of Olympia Company he had no quarrel with the way in which Mr. Henican or his law firm handled Olympia's corporate affairs. Manion testified further that the sole basis of the instant law suit was Mr. Henican's testimony at trial in 1976. (Manion deposition at pp. 30-31, 33, 34 and 45-46).

Thus, the sole material fact concerns the content of that testimony. The only question before us, then, for purposes of determining the propriety of granting the summary judgment is whether this genuine issue was in

dispute. We find that it was not.

We do not have the transcript from the 1976 trial before us. This is apparently due to Mr. Henican's failure to timely request same following the trial. The record before us, however, contains sufficient evidence of Mr. Henican's testimony at that trail. As noted above, Mr. Manion testified that the proper party plaintiff to the earlier lawsuit was Olympia Company Inc. and not Olympia Roofing Company, Inc. Moreover, Mr. Henican does not dispute that this was the content of his 1976 testimony. Clearly, then, the actual content of Mr. Henican's testimony is not in dispute and therefore is not an *issue* of material fact. Similarly, the record supports the finding that the veracity of Mr. Henican's testimony is likewise not in dispute.

The reocrd contains copies of the annual reports of "Olympia Company Inc." encompassing the years 1972-1982. These reports were filed with the Secretary of State and signed by Mr. Manion. Moreover, Mr. Manion testified regarding the name change in 1969 from Olympia Roofing to "Olympia Company, Inc." and the fact that the name was still "Olympia Company, Inc." at the time of Mr. Henican's testimony. Mr. Manion specifically testified at pp. 31-32 of his deposition, as follows:

> "Q. Let me ask you this. You filed with the court an affidavit. It was filed May 25, 1978, and the affidavit is four pages signed by you and dated May 24, 1978. Is this, in fact, your signature?
>
> A. That's my signature.
>
> Q. And in that affidavit you appear to state that subsequent to the name change of the company March 27, 1969, that's when it was changed to Olympia Company, Inc.?
>
> A. Yes.

Q. There were discussions about changing the name back to Olympia Roofing Company, Inc.

A. No question about that.

Q. But to your knowledge that was never done?

A. Never done.

Q. And you knew that was never done?

A. I had never been informed. I never signed any papers to that effect.

Q. Had the name of the company ever been changed before without you signing it?

A. No. I have said that I have no quarrel with that."

Thus, it is clear that Mr. Henican testified truthfully and accurately about the status of Olympia at the 1976 trial. Accordingly, we find there is no genuine issue of material fact and therefore, summary judgment was proper.

DAMAGES FOR FRIVOLOUS APPEAL

Appellees request that we award damages and costs as sanctions against appellants for filing a frivolous appeal. Louisiana Code of Civil Procedure Article 2164 provides:

> "The appellate court shall render any judgment which is just, legal and proper upon the record on appeal. The court may award damages for frivolous appeal; and may tax the costs of the lower or appellate court, or any part thereof,

> against any party to the suit, as in its judgment may be considered equitable."

In *Parker v. Interstate Life & Accident Insurance Company,* 248 La. 449, 179 So.2d 634, 637 (1965) the court held:

> "[W]hen counsel proclaims his sincerity, a court finds itself without just cause to disbelieve unless, and only unless, the proposition advocated is so rediculous or so oppossed to rational thinking that it is evident beyond any doubt that it is being deliberately professed for ulterior purposes."

See also, *Rogers v. D'Hubin,* 498 So.2d (La. App. 1st. Cir. 1986.) The instant appeal presents just such a case.

Mr. Manion and Olympia are no strangers to the frivolous appeal. In *Olympia Co. Inc. v. Cleotex Corp.,* 771 F. 2d 888, 893 (5th Cir. 1985) the court found that *Cleotex* was entitled to damages for frivolous appeal and stated:

> "Olympia's appellate counsel has made virtually no effort to point to evidence raising a genuine issue of material fact. His [Manion's] rambling briefs include citations to affidavits in the issue in this case, and which are unaccompanied by any explanation of what relevant evidence the cited affidavits supposedly contain.
>
> "Olympia's appellate counsel's main concern appears to be the possibility of succeeding in a future malpractice action against one of Olympia's prior attorneys.
>
> * * * *
>
> Many, if not most, of Olympia's arguments

> are...puzzling and exasperating. *We are hard pressed to imagine a more meritless, vexatious or unreasonable appeal.*" (emphasis added)

What was difficult to imagine for our Bretheren on the Federal Bench has now come to pass.

As in *Celotex* the record before us contains rambling briefs and unsupported allegations. Once again, Mr. Manion's chief concern appears to be laying the groundwork for some future malpractice action against one of Olympia's prior attorneys, Mr. Henican.

There is no dispute over the content of Mr. Henican's prior testimony. There is no evidence to support a dispute over the veracity of that testimony. Yet, despite the overwelming evidence, including Mr. Manion's own testimony, appellate put forth paragraph after paragraph of meaningless and irrelevant allegations in a clear attempt to cloud the issues. Therefore because there is no evidence and law in dispute, this appeal is frivolous; entitling the appellees to damages for a new appeal.

Accordingly, we affirm the judgment of the trial court and award $2,500.00 as damages plus costs of this appeal.

AFFIRMED

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans, DEC 14 1988, 198_____

DEAR SIR:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED

OLYMPIA ROOFING CO., INC., ET AL VS C. ELLIS HENICAN, SR., ET AL

No. CA-8908

APPENDIX D

The Supreme Court of the State of Louisiana

OLYMPIA ROOFING CO., INC.
OLYMPIA COMPANY, INC. TRAILER
TRUCK BODIES, PARTS AND SERVICES, INC., ET AL

VS NO. 89-C - 0076

C. ELLIS HENICAN, SR. AND
LAW OFFICE OF HENICAN, JAMES & CLEVELAND

— — — — — —

IN RE: Olympia Roofing Co. Inc.; Olympia Company, Inc.; Trailer Truck Bodies Pts.; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, Number CA-8908; Parish of Orleans Civil District Court Div. "H" Number 77-3453

— — — — — —

February 17, 1989

Denied.

JLD
JAD
PFC
WFM
JCW
LFC

Supreme Court of Louisiana
February 17, 1989

/s/ illegible

Clerk of Court
For the Court

APPENDIX E

The Supreme Court of the State of Louisiana

OLYMPIA ROOFING CO., INC.
OLYMPIA COMPANY, INC. TRAILER
TRUCK BODIES, PARTS AND SERVICES, INC., ET AL

VS NO. 89-C-0076

C. ELLIS HENICAN, SR. AND
LAW OFFICE OF HENICAN, JAMES & CLEVELAND

— — — — — —

IN RE: Olympia Roofing Co. Inc.; Olympia Company, Inc.; Trailer Truck Bodies Parts and Services, Inc. et al, Applying for Reconsideration of this courts action on February 17, 1989; to the Court of Appeal, Fourth Circuit, Number CA-8908; Parish of Orleans Civil District Court Div. "H" Number 77-3453

— — — — — — —

March 27, 1989

Denied.

JAD
PFC
WFM
JLD
JCW
LFC

Supreme Court of Louisiana
March 27, 1989

/s/ illegible

Clerk of Court
For the Court

APPENDIX F

ARTICLE OF AMENDMENT	‡	UNITED STATES OF AMERICA
	‡	
TO THE	‡	STATE OF LOUISIANA
	‡	
ARTICLES OF	‡	PARISH OF ORLEANS
INCORPORATION	‡	
OF	‡	CITY OF NEW ORLEANS
	‡	
OLYMPIA ROOFING CO.,	‡	
INC. CHANGING NAME TO	‡	
OLYMPIA CO., INC.	‡	---0---

KNOW ALL MEN BY THESE PRESENTS, That on this *27th* day of March, 1969, the Shareholders of the Olympia Roofing Co., Inc., a corporation organized by Act before C. Ellis Henican, Notary Public for the Parish of Orleans, State of Louisiana, dated December 28, 1949, and recorded in M.O.B. 1780, Folio 226, Parish of Orleans, Louisiana, amended ARTICLE I of its Articles of Incorporation to read:

"ARTICLE I.

The name of this corporation is:

OLYMPIA CO., INC."

At the Meeting of the Shareholders at which said Amendment was adopted, all of the shares that were issued and outstanding were not only present or represented, but voted unanimously for the said Amendment.

ATTEST:

OLYMPIA CO., INC.
(Formerly OLYMPIA
ROOFING CO., INC.)

/s/ Martha M. Augustin
Secretary

By: /s/ William J. Manion
WILLIAM J. MANION,
President

STATE OF LOUISIANA
PARISH OF ORLEANS

On March 27th 1969, before me, personally came and appeared WILLIAM J. MANION, to me personally known, who, bring by me duly sworn did say that he is the President of the Olympia Roofing Co., Inc. (the name of which has been changed in the above and foregoing Amendment, to Olympia Co., Inc.) and that the foregoing instrument was signed by him in behalf of said corporation by authority of its shareholders and William J. Manion acknowledged said instrument to be the free act and deed of said corporation.

SWORN TO AND SUBSCRIBED
BEFORE ME ON THIS 27th
DAY OF MARCH, 1969

/s/ William J. Manion
WILLIAM J. MANION

/s/ illegible
NOTARY PUBLIC

APPENDIX G

HENICAN, JAMES & CLEVELAND
ATTORNEYS AT LAW
225 Baronne Street
Suite 2601
NEW ORLEANS 70112
Cable Address: HENJA

April 3, 1969

Dr. William J. Manion
108 Stella Street
Metairie, Louisiana 70005

Dear Bill:

Tom Bernard, your insurance agent, called me on Friday and at his request, I confirmed the following facts to him:

1. Olympia Roofing Company will be a division of Olympia Company, Inc.

2. Olympia Company, Inc. is the new name of what was formerly Olympia Roofing Company, Inc. and this entity is owned on the basis of 53% by you and 27% by your mother.

3. The new corporation Trailsmobile*is and will remain a wholly owned subsidiary of Olympia Company, Inc.

I understand that the above information was furnished to Tom Bernard by Henry Guidry. Although the second item, as to the ownership between you and your mother, was not entirely clear in my mind, when Tom Bernard called me, I confirmed the fact, not only because he

told me Henry Guidry had given him the information, but also because it conformed to my general recollection at the time.

As to the first item, it is recommended that we follow the statute by filing the usual "assumed name certificate" which will show that Olympia Roofing Company is a trade name used by Olympia Company, Inc.

Trusting that you will find this satisfactory, I am
Cordially yours,

/s/ Ellis
C. Ellis Henican

*This name is actually
Trailer-Truck Bodies, Parts
& Service, Inc.

CEH:rdh

APPENDIX H

HENICAN, JAMES & CLEVELAND
ATTORNEYS AT LAW
225 Baronne Street
Suite 2601
NEW ORLEANS 70112

C. ELLIS HENICAN
JOSEPH V. BOLOGNA
LOUIS V. RAND, II
EMILE J. DREUIL, JR.
C. ELLIS HENICAN
HELENE M. WALKER
PHILIP E. JAMES, JR.
CARL W. CLEVELAND
ANDREW I. BROWN

MURRAY F. CLEVELANS (1013-1071)
OF COUNSEL
PHILIP F. JAMES
FRANCIS T. ANDERSON (PA. ONLY)
TELEHPONE: 504-581-7878
Cable Address: HENJA

November 20, 1974

Dr. William J. Manion
P. O. Box 9397
Metairie, Louisiana 70005

Dear Dr. Manion:

Immediately upon receipt this morning of your letter dated November 14, 1974, I called Mr. Guidry in an effort to get a better understanding of the problems you concluded that the corporation has on its books a substantial indebtedness to you for accrued salary which you have reported for tax purposes.

It is also my understanding that the obligation of your mother to you in the amount of $55,796.00, representing the difference between your compensation and your mother's compensation from the corporation, is not an

item which appears on the corporation's books.

The Trust Agreement under which Mr. Henican is holding, as Trustee, 600 shares of Olympia Roofing Co., Inc., registered in your name, Certificate No. 12, and 400 shares registered in the name of Mrs. Martha M. Augustin, Certificate No. 11, provides for the delivery of Mrs. Augustin's stock to you upon her death, conditioned upon your paying to your sister one-quarter of the book value thereof. I am unable to find and reference in the Trust Agreement, or the amendments thereto, to any agreement between you and your mother that you both were to receive equal compensation from the corporation. Nevertheless, if that was, in fact your agreement, a note by your mother in the amount due could be prepared and signed by her, secured by the pledge of her Certificate No. 11 for 400 shares of Olympia Roofing Co., Inc. I call your attention to the fact that the agreement contains a provision prohibing Mrs. Augustin from pledging the stock without your consent; but, inasmuch as you are to be the pledge, this provision should create no problem.

In connection with this pledge, you may wish to have your mother sign, in addition to the note, a blank stock power.

I am sending a copy of this letter, together with a copy of your letter of November 14, to Mr. Guidry so that he can confirm my conclusions, and I am also submitting a copy to Mr. Henican for his review, and he, as Trustee of the Agreement, may make additional requirements.

Very truly yours,

/s/ Helene McG. Walker

Helen McG. Walker

HMcGW/vj

cc: Mr. Henry J. Guidry
cc: Mr. C. Ellis Henican

APPENDIX I

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 77-3453 DIVISION "H" DOCKET 4

OLYMPIA COMPANY, INC.,
OLYMPIA ROOFING COMPANY, INC.
TRAILER TRUCK BODIES, PARTS & SERVICES, INC., et al

VERSUS

C. ELLIS HENICAN, SR.

FILED:_____ _____
DEPUTY CLERK

AMENDING AND SUPPLEMENTING FOURTH AMENDED PETITION IN ACTION FOR NEGLIGENCE BREACH OF CONTRACT AND MALACE

Fourth amended petition of Olympia Company, Inc. (Company), Olympia Waterproofing Company, Inc. (Waterproofing), Olympia Roofing Company, Inc. (Roofing), and Trailer Truck Bodies, Parts and Service, Inc. (TTB), Louisiana Corporations, wholly owned and/or merged, domiciled in the Parish of Jefferson (1976) and now domiciled in Parish of St. Tammy, State of Louisiana, Plaintiffs herein, renew and reiterate all of the allegations and prayers of their original and amended petitions herein, as if pleaded in extenso, and, do by these presents further amend and supplement, respectfully representing:

A.

By adding party plaintiffs:

W. J. Manion (Manion), principal stockholder of corporate plaintiffs, appearing in proper person:

Executor in and for minority stockholder submitted in Succession of Martha Penn Manion Augustin, filed probate proceedings, 24th Judicial District Court, Parish of Jefferson, State of Louisiana, numbered 200-902, Division C, represented by Manion.

B.

By asserting Standing to Sue.

All plaintiffs herein are proper parties to assert claim against C. Ellis Henican, Sr. (Henican) as said plaintiffs have a corporate and personal stake in the outcome of this controversy and litigation as will be outlined and evidenced by Exhibits attached. Further, this dispute touches upon the legal relations of all parties herein having adverse legal interests.

C.

By stating issues and allegations.

1. Plaintiffs move this Court to nullfy defendant's Notarial Act dated March 27, 1969 changing Roofing to Company, (Exhibit 12), contrary to expressed wishes of shareholders to Henican to prepetuate corporate name of Roofing and to operate as Roofing and not Company. March 27, 1969 Notarial Act lacked proper form and complete disclosure of percentage of stock ownership of

shareholders as had been reflected in previous notarial acts of merger and change of corporate name.

2. Plaintiffs urge that Henican was personal and corporate legal counsel who did intentionally neglect to perform his assigned duties and commissions.

3. Henican as Trustee for financial interest of Martha Penn Manion Augustin (Mrs. Augustin) did ignore and abuse his fiduciary duties predicated on malicious nonperformance of his trust assignment. He held all of the corporate stock. he issued no stock reflecting proper percentages after August 31, 1965 when corporate entity was Roofing. He was director of corporation by virtue of Articles of Incorporation and the Amendments thereto. He made no annual report of his trust assignment. He did not issue stock to Mrs. Augustin of Manion as their interests appeared. he did not retain shares representing percentage of Mrs. Augustin's ownership in any corporation after August 31, 1965.

4. Henican at all times after March 27, 1969 did confuse and misled shareholders and others with whom he dealt as to the proper corporate name. His conduct was intentionally deceptive without redeeming merit. He did continually, intentionally and falsely confuse and use interchangeably the designation of Roofing rather than Company, and vice versa, to the detriment of plaintiffs herein.

5. Under guise of Trusteeship, shareholders were deprived of their stock certificates and property.

6. Henican was consulted at all times and was paid for his services.

7. Plaintiffs procedural inaction following Judgment

in UPT trial March 4, 1976 (Exhibit 45) was in compliance with Henican's advice and admonition as Trustee in and for the corporate interest of Mrs. Augustin wherein the main concern was personal and corporate exposure to litigation for contracts performed by wrong corporation.

8. Henican's testimony at trial as to corporate entities, be it Roofing or Company, varied from misrepresentations made to shareholders prior to trial.

9. Mrs. Augustin perpetuated Trusteeship on February 3, 1976 by executing before Henican a notarial act of donation to her children, Manion and Mrs. Martha Manion McLin (Mrs. McLin) (Exhibit 62). this was one month prior to Henican's testimony at trial on March 4, 1976.

D.

To amend Paragraph IV to read as follows:

Since Mr. Henican was retained and paid to represent Company, Roofing, Waterproofing, and TTB from their corporate inception, the following chronology is submitted to the Court to clarify the issues:

1. Waterproofing was incorporated December 29, 1949; capitalization $10,000.00; MOB 1766, folio 567 (Exhibit 1);

2. Waterproofing stock certificate #1 to Mr. Charles D. Augustin (CDA), 50 shares (Exhibit A); later reduced to five shares January 25, 1952 per certificate #4 (Exhibit B);

3. Waterproofing stock certificate #2 to Mrs. Martha M. August (Mrs. Augustin), 49 shares (Exhibit C); later

reduced to four shares January 29, 1952 per certificate #4 (Exhibit D);

4. Waterproofing stock certificate #3 to W. J. Manion (Manion), 1 share (Exhibit E); included in stock certificate #12 (Exhibit N);

5. Articles of Incorporation were drawn in error, thereby requiring a reduction of shares (Exhibit 1, Article VIII) (Exhibit 2);

6. Roofing was incorporated December 28, 1949; capitalization $20,000.00; MOB 1780, folio 226 (Exhibit 3);

7. Roofing stock certificate #1 to CDA, 100 shares on December 31, 1949 (Exhibit O); later cancelled upon his death, December 1954;

8. Roofing stock certificate #2 to Mrs. Augustin, 99 shares on December 31, 1949 (Exhibit P);

9. Roofing stock certificate #3 to Manion, 1 share on December 31, 1949 (Exhibit Q);

10. Roofing capitalization increased to $200,000.00 July 21, 1951; MOB 1811, folio 584;

11. Roofing stock certificate #4 to CDA, 200 shares January 28, 1952 (Exhibit S);

12. Roofing stock certificate #5 to Mrs. Augustin, 200 shares January 28. 1952 (Exhibit S);

13. Charles D. Augustin died December 1954. Roofing stock certificate #6 to Mrs. Augustin, 300 shares transferred from CDA certificate #1 for 100 shares and certificate #4 for 200 shares. Succession of CDA required CDA

forced heirs be paid from stock as their interest appeared. Certificate #6 replaced by Certificate #7, but reduced to 150 shares, September 30, 1955 (Exhibit T);

14. On September 14, 1955, Mrs. Augustin designated C. Ellis Henican, Sr., (Henican) testamentary notary for executor of her estate which instrument refers to a buyout agreement to be signed upon completion of her will. Therein Henican is designated Trustee of Mrs. Augustin's property and stock as of September 30, 1955; said agreement is further supplemented on February 14, 1962; January 15, 1965; and March 24, 1965 (Exhibit 4 and 5(;

15. On September 19, 1955 Waterproofing issues certificate #4 to Mrs. Augustin for 5 shares to cancel certificate #1 of CDA (Exhibit F);

16. Waterproofing name changed to Company April 11, 1959; MOB 1961, folio 98;

17. On April 16, 1959 Mrs. Augustin executes an Act of Donation before Henican to her children. Company (formerly Waterproofing) stock certificate #5 for 9 Company shares issued to Manion, cancelling Waterproofing stock certificates #2 & #4 (Exhibit G);

18. On April 16, 1959 computation errors required 9 shares to be cancelled as to Company certificate #5 and the 9 shares were reduced to 6.5 shares reflected in stock certificate #6 (later cancelled by issuance of Roofing share certificate #12) (Exhibit H);

19. April 16, 1959, Company (formerly Waterproofing) certificate #7 for 300 shares issued to Manion (Cancelled by certificate #12) (Exhibit I);

20. June 30, 1961, Company capitalization increased to $100,000.00 ($300,000.00 maximum). MOB 1991, folio 523;

21. February 14, 1962, Henican executes supplemental Trust agreement with Mrs. Augustin (Exhibits 4 and 5);

22. Roofing stock certificate #7 for 150 shares dated September 30, 1955 (Exhibit U), cancelled certificate #6 (Exhibit T) *erroneously* issued for 300 shares. Correction done February 14, 1962, some seven (7) years later;

23. Roofing merged to Company December 28, 1964 with reservations stating that Company would revert name back to Roofing; MOB 2067, folio 335 (Exhibit 6). Henican remains Director of Company (Exhibit 6); stock issuance in Company corrected in amended charter.

	Issued	Mrs. Augustin	Manion
Roofing Co. (Exhibit 6)	450 307½	204*	307½**

24. December 31, 1964 Company stock dividend to Mrs. Augustin for 196 shares, certificate #9 (Exhibit K) (replaced by certificate #11)

25. December 31, 1964 Company stock dividend to Manion, 292½ shares, certificate #10 (Exhibit L) (cancelled, replaced by certificate #12);

* 204 shares on December 31, 1964 to Mrs. Augustin by certificate #8 (Exhibit J) cancelled by certificate #11

** 307½ shares on December 31, 1964 to Manion (not drawn nor issued)

26. January 15, 1965 Henican executes supplemental Trust agreement with Mrs. Augustin;

27. March 17, 1965 Company name changed to Roofing; MOB 2075, folio 118; (Exhibit V);

28. March 24, 1965 Henican executes supplemental Trust agreement with Mrs. Augustin;

29. April 1, 1965 Roofing (formerly Company) stock certificate #11 for 400 shares issued to Mrs. Augustin replaced certificate #8 and #9, held in Trust by Henican, Trustee under agreement (Exhibit M); Stock not issued nor in the possession of Mrs. Augustin or Manion;

30. April 1, 1965 Roofing (formerly Company) stock certificate #12 for 600 shares issued to Manion replaces:

Certificates	*Exhibits*
#3	E
#6	H
#7	I
#10	L

Stock and certificates #11 and #12 held by Henican, Trustee under agreement (Exhibit N); Manion letter (Exhibit N);

31. August 31, 1965 Mrs. Walker, associate of Henican, outlines Henican's role as Trustee of Mrs. Augustin's interests (Exhibit 5);

THE CORPORATE ACTIVITY IS ROOFING AND NOT COMPANY

32. Union Passenger Committee (City of New Orleans) (UPT) sale of Square 642 to Roofing occasioned on January 23, 1968;

33. Catholic sale of Square 643 to Roofing occasioned on February 5, 1968;

34. Manion's letter to Henican dated January 30, 1969 requested corporate indentification, quoting in part:

> "When the stock of Olympia Roofing Company, Inc. and Olympia Company, Inc. were combined and re-issued, it is my understanding the Olympia Roofing Company, Inc. was survivor and Olympia Company, Inc. was reduced to a non-operating status, but you promptly arranged with the Secretary of State to have the name of Olympia Company, Inc. reserved so that there would not be any conflicts in our business operations . . . ."
> cc: Henry Guidry (Exhibit 7);

35. February 5, 1969 Roofing letter to Mr. Brusse, Trailmobile Vice President, indicationg Henican represents both Roofing and Boulet familes in negotiations with Trailmobile (Exhibit 8);

36. Trailmobile telegram and correspondence to Roofing cancelling agreement to sell parts and service franchise (Exhibit 9). Henican consulted as to breach of contract; Henican declined to represent Roofing as he did not want to be involved in controversy with Trailmobile that could possibly injure the Trailmobile-Boulet business relationship. Consulted Mr. Adrian Duplantier to protect Olympia's interests with Trailmobile;

37. February 21, 1969 Manion letter to Henican requesting capitalization be increased to $500,000.00 (Exhibit 10); not done by Henican;

38. March 21, 1969 TTB chartered (Exhibit 11);

39. March 27, 1969 Roofing changed to Company (Exhibit 12);

40. April 1, 1969 Trailmobile sublease with Company (Exhibit 13);

41. May 15, 1969 Henican letter to Manion in re Act of Deposit for notarial acts performed by his office - accepted (Exhibit 14);

42. Boulet lease June 23, 1969 (Exhibit 15);

43. Manion admitted to practice before Louisiana Bar as an attorney at law;

44. Henican retained to represent Roofing in UPT dispute, October 9, 1969 (Exhibit 16);

45. February 28, 1970 Henican letter to Mr. Rousseau (Exhibit 17);

46. Boulet lease signed with Company March 30, 1970; COB 698, folio 291; COB 691, folio 627;

47. Manion letter to Henican dated February 25, 1970 (Exhibit 18);

48. Court of Appeals Judgment April 6, 1970;

49. Henican's letter to Mr. Kieffer dated April 8,

1970 (Exhibit 19);

50. July 9, 1970 Henican letter to Messers. Rousseau, Gisevius and Kieffer (Exhibit 20);

51. August 4, 1970 Henican letter to Manion (Exhibit 21);

52. August 10, 1970 Henican solicits Manion for legal referrals (Exhibit 22);

53. February 15, 1971 Henican to Mr. Kieffer (Exhibit 23);

54. March 17, 1971 Manion letter to Henican requesting he handle anti-trust suit against Trailmobile (Exhibit 24);

55. June 16, 1971 Henican expresses no interest in pursuing anti-trust suit against Trailmobile while still representing Boulet interests (Exhibit 25);

56. July 21, 1971 Henican relieved of representing plaintiffs herein as well as all other personal and corporate activities of Augustin-Manion families, but not Trust agreement relationship with Mrs. Augustin's interests in plaintiff corporations as to the succession rights of her daughter, Mrs. M. M. McLin (Mrs. McLin) (Exhibit 26);

57. August 4, 1971 Henican will select documents to be released to Manion (Exhibit 27);

58. Henican circulates his disassociation from UPT controversy with defendant parties August 6, 1971 (Exhibit 28);

59. February 14, 1972 Henican refers to cancellation of aforementioned Boulet lease of March 30, 1970 as one with Roofing and not Company; refer to insert No. 2 of Henican's working papers sent to Manion and Boulet referring to Roofing and not Company as to the contents of the lease and sublease arrangements (Exhibit 29);

60. August 11, 1972 Roofing filed civil actions against UPT, Civil District Court No. 543-922;

61. December 8, 1972 Manion associates with John C. Hose as counsel of record in Roofing litigation against UPT (Exhibit 30);

62. May 18, 1973 Henican letter to Manion in re Roofing and Waterproofing original stock stubs wherein he makes his first safe search (Exhibit 31);

63. May 24, 1973 Manion requested and on May 28, 1973 law firm of Henican, James & Cleveland (HJC) delivered to Manion share certificates No. 1 through No. 7 of Roofing and Waterproofing (later Company) with stubs attached. This was in excess of four years after name was changed from Roofing to Company, which occasioned on March 27, 1969 (Exhibit 32);

64. June 27, 1973 Manion requested from Henican a copy of TTB charter (Exhibit 33);

65. June 29, 1973 Manion letter to Henican requesting to respond to his inquiry as to whether TTB is a wholly owned subsidiary of Roofing as discussed in conference at Henican's office (Exhibit 34);

66. July 23, 1973 Henican submits handwritten memorandum stating that TTB is a wholly owned sub-

sidiary of Company and not Roofing. Henican states shares should have been issued by Mr. Henry Guidry (Mr. Guidry) in name of Company. Henican makes his second safe search (Exhibit 35);

67. November 14, 1974 Manion on Roofing stationery wrote a request to Mrs. Walker stating need for determination, percentage of ownership and distribution of share certificates indicating incidence of respective ownership interest of Mrs. Augustin and Manion in Roofing and Company (Exhibit 36);

68. May 1975 Mrs. Walker leaves law firm of JHC;

69. May 16, 1975 Manion letter to Henican in re Celotex anti-trust suit (Exhibit 37);

70. June 6, 1975 Henican's response to Manion's letter relative to Celotex anti-trust suit (Exhibit 38);

71. June 16, 1975 another Henican response to Manion's request relative to anti-trust suit against Celotex (Exhibit 39);

72. June 19, 1975 Henican addresses letter to Louisiana Attorney General in re Roofing (a Louisiana corporation) relative to anti-trust proceedings against Celotex and Standard Roofing, Inc. (Exhibit 40);

73. September 26, 1975 from information received from office of HJC, Mr. Guidry prepared and submitted a list to Manion which was forwarded to Mrs. Walker (no longer associated with HJC) and Henican reflecting stock ownership percentages of Mrs. Augustin and Manion. Certificates No. 8, 9, 10, 11, and 12, if in fact issued, were never received by Manion or Mrs. Augustin, but held in trust by

Henican. Mr. Guidry did not prepare and issue any certificates. If issued, all stock certificates, No. 8 through No. 13, remained with Henican as Trustee. However, the last declaration as to stock correction occurred on August 31, 1965, ten years prior. Plaintiffs do challenge merger and change of name from Roofing to Company by Henican's notarial act of March 27, 1969 as being incomplete in form, substance and contrary to desires and operational aims of plaintiff corporations (Exhibit 41);

74. Olympia Supply chartered December 10, 1975, recorded in Jefferson Parish Charter Book 29, folio 966;

75. December 15, 1975 statement from HJC for their review of Perry-John sale of Olympia property by Roofing (Exhibit 42);

76. December 17, 1975 Manion letter to Henican (Exhibit 43);

77. January 15, 1976 Henican notified of proposed witness list and his required presence in and for Roofing in filed controversey with UPT. Henican expressed no exception, correction nor was any response expressed by Henican as to the capacity of Roofing to pursue litigation, as opposed to Company, against UPT. Witness list was sent to Henican by Mr. Russell Roberts, trial counsel for Roofing against UPT (Exhibit 44); Mrs. Augustin's trustee and attorney (Exhibit 44A);

78. March 4, 1976 UPT trial; Judgment of dismissal; Roofing improper party to file lawsuit (Exhibit 45);

79. March 5, 1976 Manion letter to Henican (Exhibit 46);

80. March 10, 1976 Manion letter to Henican in re Olympia Supply, Inc. (Exhibit 47);

81. March 19, 1976 Henican's two letters to Manion (Exhibit 48);

82. April 14, 1976 Note of Mrs. Solera as to telephone dictation from Henican's office (Exhibit 49);

83. April 27, 1976 statement from office of HJC as to out-of-pocket expenses for Roofing vs. UPT (Statement addressed to Roofing, not Company) (Exhibit 50);

84. April 29, 1976 statement from office of HJC in re Olympia Supply, Inc. (addressed to Roofing and not Company) (Exhibit 51);

85. September 13, 1976 Henican withdraws from representing Olympia in the anti-trust controversy against Celotex and Standard Roofing, Inc. (Exhibit 52);

86. September 20, 1976 Manion letter to Henican (Exhibit 53);

87. September 23, 1976 Henican's response to Manion's letter of September 20, 1976 (Exhibit 54);

88. October 14, 1976 Henican's response to Manion's request for statement for services rendered (Exhibit 55);

89. November 10, 1976 Manion again initiates request for statement of expenses from Henican (Exhibit 56);

90. Henican still Trustee of Roofing share certificates as of and after November 26, 1976 (post trial). Company stock certificates never issued (Exhibit 57);

91. Mrs. Augustin dies December 5, 1976;

92. December 10, 1976 Mrs. McLin and Manion agree on succession distribution without assistance of Henican (Exhibit 58);

93. April 21, 1977 Henican's letter to Manion relative to lodging this filed litigation against him (Exhibit 59);

94. May 12, 1978 Henican notifies Mrs. Walker of her potential exposure should he be cast in judgment (Exhibit 60);

95. February 3, 1976 Mrs. Augustin executed before Henican a notarial act of donation to her children, Manion and Mrs. McLin, (Exhibit 61).

E.

Delete Paragraph IX and amend said paragraph to read as follows of the original and amended petitions herein, as if pleaded in extenso.

WHEREFORE, petitioners pray:

1. For leave of Court to file this Amended Petition; and

2. For all of the relief originally sought and as amended herein; and

3. That plaintiffs be compensated for loss experienced by Trailer Truck Bodies Parts and Service, Inc. in the sum of $101,177.83 plus interest, costs and attorney fees; and

4. Plaintiffs be compensated in the sum of $500,000.00 for aggrevation and mental distress from misrepresentations made by Henican; and

5. Plaintiffs be compensated for damages and loss of opportumity to pursue litigation against UPT in the sum of $1,000,000.00; said litigation being predicated on sale of property by wrong agency of City of New Orleans who had no legal right to sell Square 642 to Olympia Roofing Company, Inc.; and

6. That Henican's notarial act of March 27, 1969 be declared null and void for reasons alleged and evidenced herein' and

7. That Henican be deemed liable for any damages resulting from plaintiff's use contracturally of the entity Roofing rather than Company from March 27, 1969 to March 5, 1986.

Respectfully submitted;

/s/ W. J. Manion

W. J. MANION
P. O. Box 1776
Slidell, LA 70459
1-649-4000
Attorney for Plaintiffs

ORDER

Considering the allegations and prayer thereof:

IT IS SO ORDERED that the Amending and Supplementing Fourth Amended Petition be filed as prayed for and according to law.

New Orleans, Louisiana, this *20th* day of *June*, 1984.

/s/ Revius O. Ortique, Jr.
JUDGE

SHERIFF PLEASE SERVE:

Jack M. Alltmont, Esq.
2500 - 601 Poydras Street
New Orleans, LA 70130
Attorney for Defendant

Personal service requested or
upon an agent authorized to
accept service for Mr. Alltmont.

APPENDIX J

STATEMENT

HENICAN, JAMES & CLEVELAND
ATTORNEYS AT LAW
225 Baronne Street
Suite 2601
NEW ORLEANS 70112

December 15, 1975

Olympia Roofing Co.
108 Stella Street
Metairie, Louisiana 70005

ATTN: WILLIAM J. MANION

TO FEE:

For all professional services rendered in assisting you in selling your real estate to Perry-John Realty, including, among other things, review of corporate resolutions, with suggested changes, attendance at passing of act of sale, etc:

$200.00

APPENDIX K

D-101

UNITED STATES OF AMERICA

State of LOUISIANA

Parish or County of ORLEANS

Be It Known, That on this *tenth P* day of the Month of *December* in the year of our Lord one thousand nine hundred and *Seventy-five* BEFORE ME, *JAMES HANEMANN, JR.*
a Notary Public, duly commissioned and qualified, in and for the City of *New Orleans* and the Parish (or County of) *Orleans* therein residing, and in the presence of the witnesses hereinafter named and undersigned.

Personally Came and Appeared:

OLYMPIA ROOFING COMPANY, INC., a corporate organized and esisting under the laws of the State of Louisiana, with its domicile at New Orleans appearing herein through Dr. William Manion its President duly authorized hereunto by virtue of resolutions of the Board of Directors of said corporation adopted at a meeting held October 20, 1975 a certified copy of said resolutions being annexed hereto and made a part hereof;

Sure that *it* do by these presents grant, bargain, sell, transfer, assign, set over, abandon and deliver, with all legal warrants and substitution and subragation in and to all the rights and actions of warranty *it* or may have against all preceeding owners and vendors, unto

---

JOHN MENGE EASTMAN, of full age of majority and a resident of Orleans Parish, Louisiana who declared under oath unto me, Notary, that he has been married but once and then to Kathleen Sharp, with whom he is presently living and residing; and

GEORGE PERRY EASTMAN III, of full age of majority and a resident of Jefferson Parish, Louisiana, who declared under oath unto me, Notary, that he has been married but once and then to Marda Sue Favor, with whom he is presently living and residing;

(illegible) accepting, and purchasing for *their* heirs and assigns,

acknowledging due delivery and possesion thereof, all and singular the followign property to-wit:

THAT PORTION OF GROUND, together with all the buildings and improvements thereon, and all of the rights, ways privileges, servitudes, appurtenances and advantages thereunto belonging or in anywise appertaining, situated in the Seventh District, City of New Orleans, State of Louisiana, comprising a portion of Square 643 bounded by Dublin Street, Peach Street and Dante Street and the right of way for the Department of Highways, Greater New Orleans Expressway, measuring 267 feet, 4 inches, 7 lines on

Peach Street by 103 feet, o inches, 2 lines on Dante Street by 258 feet, 7 inches, 1 line on one side of the property abuting the expressway right of way and 41 feet, 2 inches 5 lanes on the opposite side abutting the right of way for the expressway.

Aquired by purchase from Roman Catholic Church of the Archdiocese of New Orleans, per act passed before F. J. Gisevius, Jr., N.P. dated February 5, 1968, filed February 13, 1968, registered in C.O.B. 683, folio 640.

(illegible) have and to hold the above described property unto the said purchaser *their* (illegible) assigns forever.

....NE VARIETUR....
For indentification with an ACT OF SALE passed before me this day.
New Orleans, Louisiana December 10, 1975

MINUTES OF THE SPECIAL METING OF THE BOARD OF DIRECTORS OF OLYMPIA ROOFING COMPANY, INC. HELD ON OCTOBER 20, 1975 AT 7:00 p.m.

/s/ James Hanemann, Jr.

JAMES HANEMANN, JR.
Notary Public

... that William J. Manion, President of the Corporation, be ... thereby authorized and impowered on behalf of the Corporation... the offer to sell to Perry-John Realty the following described... to wit:

... portion of ground in the 7th District, City of New Orleans, a portion of Square 643 bound at Dublin Street, Peach Street, and Dante Street, and the right of way for the Department of Highways, Greater New Orleans Expressway, measuring 267 feet 4 inches 7 lines on Peach Street by 103 feet 0 inches two lines on Dante Street by 258 feet 7 inches one line on one side of the property abuting the expressway right of way and 41 feet 2 inches 5 lines on the opposite side abutting the right of way for the expressway.

IT IS FURTHER RESOLVED, that the consideration of this sale shall be in the sum of $170,000 to be paid in Cash at the Act of Sale. Consistent..., Pratt, Inc. agreement to purchase Wagnespack, Pratt, Inc. ... a commission of $4420.00 and Chalmette Realty, Inc.-Manion... shall receive a commission of $4420.00, the net to the... being realized from the sale to be $161,160.00.

IT IS FURTHER RESOLVED that Wagnespack, Pratt, Inc. may hold in their... a check from Perry-John Realty in the amount of $17,000 from ..., Perry-John Realty, representing the deposit on the offer to ... Dante Street, New Orleans, Louisiana.

IT IS FURTHER RESOLVED that William J. Manion is authorized to appear... Notary Public and execute an Act of Sale to Perry-John Realty, ... herein, for cash only, under such terms and conditions as he deems ... .

/s/Hazel P. Manion

Hazel, P. Manion,
Secretary-Treasurer

/s/ W. J. Manion

W. J. Manion, President

/s/ Martha M. Augustin

Martha M. Augustin, Secretary

CERTIFICATE

I Hazel P. Manion, Secretary-Treasurer of Olympia Roofing, Inc. do sware the above and foregoing to be true and correct copy of the Minutes ... Meeting of the Board of Directors of said Corporation, duly ... called, convened and held at 7:00 o'clock on the 20th day of October, 1975 in New Orleans, Louisiana, where a quorum of the directors ... and that the smae has not been revoked or recinded.

/s/ Hazel P. Manion
Secretary

/s/ W. J. Manion
W. J. Manion

/s/ Martha M. Augustin
Martha M. Augustin

This sale is made and accepted for and in consideration of the price and sum of One Hundred Seventy Thousand and 00/100 ($170,000.00) DOLLARS. ... all of the said purchases have wel and truly paid, in ready and current money to ... vendor who hereby acknowledge the receipt and grant full acquittance and discharge therefor.

... State and City taxes up to and including the taxes due and exigible in 1975 ... as per annexed certificates.

... reference to the certificates of the Register of Conveyances and Register of Mortgages and for the ParishXXXXXX of Orleans annexed hereto and made a part hereof

... appear that said property has been heretofore alienated by the vendor it is subject to any encumbrance whatever.

... reference to Paving Certificate and Paving research fo the City of New Orleans ... it does not appear that there is any paving or any paving items rendered ... the said property

... parties to this Act are aware that the aware that the Mortgage Conveyance and paving Certif:

... referred to are open and not yet dated and signed, and

... from all responsibility by reason thereof.

... parties hereto take cognizance of the fence encroachments ... on the annexed print of survey made by Errol E. Kelly, ... Notary, and the surety on his official bond, from ... all liability that may result therefrom.

Be It Done and Passed in my office/at *New Orleans, Louisiana in triplicate originals* ... and year herein first above written, in the presence of Messieurs ... and Deirde Reid

... who hereunder sign their names with the said appearers, and me, ... of the whole.

/s/ George Perry Eastman, III
GEORGE PERRY EASTMAN, III

/s/ illegible

/s/ John Menge Eastman
JOHN MENGE EASTMAN

/s/ illegible

/s/ Dr. William Manion, Pres
OLYMPIA ROOFING COMPANY, INC.
BY: DR. WILLIAM MANION, PRES.

/s/James Hanemann, Jr.
NOTARY PUBLIC

Registered in Conveyance Book
_____day of_____, 19_____

Book 730 Folio 698

New Orleans 12-10-75

Supreme Court, U.S.
FILED
JUL 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-2089

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

OLYMPIA ROOFING COMPANY, OLYMPIA COMPANY, INC., W.J. MANION, TRAILER-TRUCK BODIES, PARTS AND SERVICE, INC., WEATHERCAP, INC., OLYMPIA SUPPLY COMPANY, INC. and ESTATE OF MARTHA M. AUGUSTIN
Petitioners

v.

C. ELLIS HENICAN AND LAW OFFICE OF HENICAN, JAMES & CLEVELAND
Respondents

SUPPLEMENTAL BRIEF IN SUPPORT OF ORIGINAL PETITION FOR WRIT OF CERTIORARI

W. J. MANION
P. O. Box 1776
Slidell, LA 70459
(504) 649-4000
La. Bar No. 9098

Attorney for Petitioners

27 pg

LIST OF PARTIES AND OTHERS

Pursuant to Supreme Court Rules 21.1(b) and 28.1, counsel for the Petitioners certifies that the following list of persons or corporations either have an interest in the outcome of this case or were parties to the proceeding in the Court whose judgment is sought to be reviewed.

Petitioners/Plaintiffs/Appellants

Olympia Roofing Company, Olympia Company, Inc., W.J. Manion, Trailer-Truck Bodies, Parts and Service, Inc., Weathercap, Inc., Olympia Supply Company, Inc. and Estate of Martha M. Augustin.

Respondents/Defendants/Appellees

C. Ellis Henican, Trustee and Law Office of Henican James & Cleveland

Others

Clerk, Civil District Court, Parish of Orleans, State of Louisiana
Clerk, Louisiana Court of Appeals for the Fourth Circuit
Clerk, Supreme Court of Louisiana
Hon. Revius O. Ortique, Jr., Judge

W.J. MANION, Individually
and attorney of record
for Petitioners
La. Bar No. 9089
P. O. Box 1776
Slidell, LA 70459
(504) 649-4000

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OCTOBER TERM, 1988

OLYMPIA ROOFING COMPANY, OLYMPIA COMPANY, INC., W.J. MANION, TRAILER-TRUCK BODIES, PARTS AND SERVICE, INC., WEATHERCAP, INC., OLYMPIA SUPPLY COMPANY, INC. and ESTATE OF MARTHA M. AUGUSTIN
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v.

C. ELLIS HENICAN AND LAW OFFICE OF HENICAN, JAMES & CLEVELAND
Respondents

SUPPLEMENTAL BRIEF IN SUPPORT OF ORIGINAL PETITION FOR WRIT OF CERTIORARI

Defendant-respondents have waived filing any brief in opposition to Petition for Writ of Certiorari.

Plaintiff-petitioners respectfully submit this Supplement Brief in support of Petition for Writ of Certiorari.

A recent case, Anderson v. Aetna Life and Casualty, 535 So.2d 1070 (La.App. 2 Cir. 1989), supports this brief. Printing of Anderson v. Aetna Life and Casualty appears in the last issued volume by West Publishing Company, Louisiana Cases, Volume 535 & 536.

I.
REASON FOR GRANTING WRIT

Respondents' motion for summary judgment was heard on April 16, 1987. Commissioner appointed by District Court heard arguments relative to trusteeship of C. Ellis Henican ("Mr. Henican"), respondent, as set forth on Page 26, et seq., of the hearing transcript.

Commissioner refused to rule on breach of duty owed by Mr. Henican as said conduct being controlled by provisions of Louisiana Trust Code, LSA-

R.S. 9:1721, et seq. Therefore, issue of Trust Code violations are not res judicata and is subject to litigation in another prolonged civil suit unless reversal and remand occasions herein.

District Court and Commissioner predicated summary judgment dismissal on the issue that Mr. Henican did not testify falsely under oath on March 4, 1976. This was an issue urged in the original petition, but plaintiffs' Fourth Amended Petition enlarged liability by alleging Mr. Henican's breach of trustee fiduciary duty owed to the petitioners herein. Since petitioners conceded Mr. Henican did not testify falsely at trial, a reversal and remand is in order to try the issue of Trustee's negligence and breach of fiduciary duty owed petitioners.

II.

Louisiana Trust Code is stricti juris. Law applicable to a given case determines what is material fact. Only those facts, having some legal significance, and controlled in some way the legal relations of the parties, are material. Ahten v. Citizens Homestead Association, 163 So.2d 403, 405 (La.App. 4 Cir. 1964); LSA-C.C.P. art. 966.

Mr. Henican's violations of Louisiana Trust Code are not irrelevant or inconsequential matters. Summary judgment, which deprives petitioners of trial on the merits, is not a substitute for a trial. Walmsley v. Gilmore, 144 So.2d 625 (La.App. 4 Cir. 1962).

III.

On September 14, 1955, Mrs. Martha M. Augustin ("Mrs. Augustin"), designated

Mr. Henican as testamentary notary for and executor of her estate, which instrument refers to a buyout agreement between Mrs. Augustin and her son, W. J. Manion ("Mr. Manion"). The agreement was duly signed before Mr. Henican. In the aforesaid agreement, Mr. Henican is designated as Trustee of Mrs. Augustin's property and stock as of September 30, 1955; said agreement being further supplemented on February 14, 1962; on January 15, 1965; and again on March 24, 1965 (Appendix B).

Mrs. Augustin surrendered all of her stock in Olympia Roofing Company and Olympia Waterproofing Co., Inc. to Mr. Henican as Trustee. This was an authentic act of donation purporting to give Mr. Manion an extra portion of Mrs. Augustin's estate, provided buyout

agreement was executed after Mrs. Augustin's death. These provisions were set forth in Mrs. Augustin's olographic will dated September 14, 1955 (Appendix A).

As Trustee, Mr. Henican authored and supervised the employment contracts of Mrs. Augustin, Mr. Manion, and key personnel of Olympia, Messrs. Rappold and Spadafora; the aforementioned being participants in equal shares of profit and drawing commensurate and equal salaries.

Upon Mrs. Augustin's death, buyout agreement was made executory, and Mr. Manion paid his sister, Mrs. McLin, the share interest realized from buyout agreement (Appendix C).

The donative intent of Mrs. Augustin was realized upon rendering judgment of

possession of her estate, thereby consummating intervivos donation and a last will and testament effecting a donation mortis causa. Anderson v. Aetna Life and Casualty, 535 So.2d 1070 (La.App. 2 Cir. 1989), writs denied.

From what has been stated so far, it is obvious that Mr. Henican was a very active Trustee, and that Mrs. Augustin was a very trusting soul.

CONCLUSION

The District Court, in passing on a motion for summary judgment, is not to determine the merits of the issue raised as to the alleged breach of Trustee fiduciary duty owed petitioner, but to determine whether there is a genuine issue of material fact, which burden is carried by the Trustee. The Trustee has not come forward to defend asserted

allegations of negligence. Therefore, trial on the merits is necessary to resolve all disputed facts. Vallier v. Aetna Financial Company, 152 So.2d 112 (La.App. 3 Cir. 1963).

Mrs. Augustin, as both settlor and beneficiary of Trust during her lifetime, had a right to institute a cause of action against Mr. Henican, Trustee, for breach of fiduciary duty owed. This cause of action was a property right. Upon her death, those rights were acquired by her legal and testamentary heir by seizen under LSA-C.C. art. 940 & 943. Since Trust Code is sui generis, any allegation of Trust Code abuses should have been considered by the Court separately.

Mr. Henican should have initiated and prosecuted the breach of contract

action against the City of New Orleans. Prior thereto, he was active for some 18 months trying to get the City of New Orleans to ratify the sale of Square 642. There is no question that Mr. Henican failed to serve as a Trust fiduciary-simply stated, he possessed all stock that was issued (Roofing) and never issued new stock of the viable corporation in the name of Company. LSA-C.C.P. art. 699; LSA-R.S. 9:2222.

State courts have abused constitutional guaranties provided by Fourteenth Amendment, and under statutory authority cited herein, it was manifest error or clearly wrong to grant summary judgment dismissal with such important issues of material fact unresolved, thereby denying legal determination of issues as set forth in Fourth Amended

Petition.

Under legal concept of mitigation, Olympia was required to exhaust all legal means against City of New Orleans before pursuing claim for damages from Mr. Henican. Trier below was required to first determine liability of City of New Orleans for consequences of null sale to Roofing. Once that was decided, liability of Mr. Henican, et al, would be addressed therefore to render summary judgment in favor of Mr. Henican, et al, was premature and improper. Plaintiffs and their counsel truly believe in the merit of their claim against Mr. Henican in the negligence and breach of fiduciary duty he owed as a Trustee.

District Judge denied Olympia a new trial. Summary judgment was granted defendants. The District Court below

would not address the issue of Trusteeship; Court ignored Mr. Henican's deceptive conduct and misrepresentations. District Court denied Mr. Henican had any responsibility for examining instruments relative to the Perry-John Realty, Inc. act of sale. It is urged that such a ruling by District Judge is clearly wrong as Mr. Henican was paid for his services.

It is submitted that District Judge misread Crawford v. Green and Assoc., 493 So.2d 734 (La.App. 2 Cir. 1987), which dealt with attorney's breach of duty owed client. Mr. Henican had a duty to examine indices of public record to determine, prior to trial, the proper corporate entity of Olympia if he could not establish that proof from his own office files.

F.R.C.P. Rule 61, 28 U.S.C.A., sums

up Petitioner's position wherein the courts at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantive rights of the parties. If constituted rights are violated and affected, remand and new trial is mandatory. For the foregoing reasons, it is urged that Writ of Certiorari be issued.

Reversal and remand of this litigation to District Court is urged by petitioners herein.

Respectfully submitted,

W. J. MANION
P. O. Box 1776
Slidell, LA 70459
(504) 649-4000
La. Bar No. 9098
Attorney for Petitioners

APPENDIX A

New Orleans, Louisiana
September Fourteenth 1955

I, Mrs. Martha Penn Manion Augustin, hereby make this my last will and testament; and I revoke any and all wills and codicils heretofore made by me.

I have been married twice, the first time to William Joseph Manion, who died many years ago. And of my first marriage, two children were born, namely: Mary Martha Manion McLin and Dr. William Joseph Manion. My second marriage was to Charles Dupre Augustin, now deceased, and by whom I had no children. I have never adopted any child and I have never been adopted by anyone.

All of the property which I own is my separate and paraphernal property; and the said property includes all of the outstanding stock of Olympia Roofing Company, Inc. and Olympia Waterproofing Company, Inc.

Accordingly, I do hereby will and bequeath all of my stock in the Olympia Roofing Company, Inc. to my son, Dr. William J. Manion, provided the delivery of said share to him shall be subject to his paying to his sister, Mrs. McLin, an amount equal to 1/4 of the actual book value of said shares. The amount to be paid within one year of my death with

interest at 5% per annum from the date of my death, until paid. I shall forthwith confirm these provisions in an agreement with my son which agreement has already been prepared to my satisfaction and is awaiting execution forthwith at completion of this, my said will.

In and to the extent the bequest of this stock shall impinge upon the legitime of my said daughter, my son shall have and is hereby given the absolute and unconditional right to pay to my said daughter, in cash (or in property acceptable to her) whatever amount is necessary in order to make up her legitime, if she has not received sufficient from the bequest made below to constitute her forced portion.

I do hereby will and bequeath the remainder of my estate, including in property possessed by me at time of my death, whether it be real, personal or mixed, and wherever located, unto my said son, Dr. William J. Manion, and my said daughter, Mary Martha McLin, share and share alike and cojointly.

I hereby name my son, Dr. William J. Manion, as my executor with full seizin and without bond. If he should be unable or unwilling to act, I name Mrs. Sarah Penn Strada in his place and trust and under the same conditions.

I name C. Ellis Henican as the attorney and notary of my estate, and if he should be unable to act, I name Murray F. Cleveland in his place and stead.

This entirely written, dated and signed by my own handwriting and in the state aforestated.

(signed) Martha Penn Manion Augustin

FILED MAY 25, 1977
DONNA GRIFFIN, DEPUTY CLERK
JEFFERSON PARISH, LOUISIANA

HENICAN, JAMES & CLEVELAND
Attorneys at Law
Twenty-Sixth Floor
225 Baronne Street
New Orleans 70112

August 31, 1965

CERTIFIED MAIL

Dr. William J. Manion
108 Stella Street
Metairie, Louisiana 70005

Dear Dr. Manion:

We are enclosing the following:

1. Stub for and stock certificate No. 8 for 204 shares of Olympia Co., Inc. issued to Mrs. Martha M. Augustin. Please have Mrs. Augustin sign the receipt on the stub and return the stub and stock certificate to us to be placed in the stock records of Olympia Co., Inc. (now Olympia Roofing Co., Inc.). You will recall that the shares represented by this certificate were included in certificate No. 11 issued when the change of name of the corporation was authorized.

2. Stub for and certificate No. 9 for 196 shares issued to Mrs. Martha M. Augustin. Please have Mrs. Augustin sign the receipt on the stub and send both the stub and stock certificate to us to be

placed in the stock records. The shares represented by this certificate were included in certificate No. 11 issued at the time the name was changed.

3. Stub for and certificate No. 10 for 292-1/2 shares of Olympia Roofing Co., Inc. stock issued to Dr. William J. Manion. Please sign the receipt on the stub and return both the stub and stock certificate to us. The shares represented by this certificate were included in certificate No. 12.

4. Stub for certificate No. 11 covering 400 shares of Olympia Roofing Co., Inc. (formerly Olympia Co., Inc.). Please have Mrs. Augustin sign this stub and return to us. Certificate No. 11 is being held by Mr. Henican as trustee under the agreement dated September 30, 1955, as supplemented on February 14, 1962, January 15, 1965 and March 24, 1965.

5. Irrevocable stock power to be signed by Mrs. Augustin covering the 400 shares held by Mr. Henican under aforementioned agreement as supplemented.

6. Stub for certificate No. 12 for 600 shares of Olympia Roofing Co., Inc. formerly Olympia Co., Inc. Please signed the receipt on the stub and return to us. The stock certificate is being held by Mr. Henican as trustee under the aforementioned agreement and supplements.

7. Supplements dated February 14, 1962, January 15, 1965 and March 24, 1965 to agreement dated September 30, 1955.

8. Our statement covering the costs and fees in connection with the merger and change in name.

The minutes for both companies have been brought up to date and your minute book is now ready to be delivered. Shall I mail the book or will you have someone pick it up?

Very truly yours,

HENICAN, JAMES & CLEVELAND

By
Helene McG. Walker

HMcGW/lfp

Enc.

C-1

SUCCESSION OF
MARTHA PENN MANION AUGUSTIN

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA
NO. 200-902 DIVISION "C"

_____ _____
FILED DEPUTY CLERK

JUDGMENT OF POSSESSION

Considering the petition for possession and the record of this proceeding, satisfactory proof having been submitted to this Court that no inheritance taxes are due by the heirs and that there is no necessity for an administration of this succession, the law and evidence entitling petitioners to the relief prayed for, and for the reasons this day orally assigned:

IT IS ORDERED, ADJUDGED AND DECREED that:

1. William J. Manion and Mary Martha Manion McLin, testamentary heirs and legatees of the olographic will and testament and codicils of decedent filed herein be sent into possession pursuant to the provisions of the testament and codicils for distribution belonging to the succession of the decedent.

2. The only real property of the succession of the decedent is located in Kenner Projects, Parish of Jefferson, State of Louisiana, and as set forth in Descriptive List is more fully described, including but not limited to the property described below:

* * * * * * * * * * *

Olympia Stock
400 shares @ $209.64

* * * * * * * * * * *

The deceased made no donation or transfer of property for an inadequate consideration within one year prior to death, and she did not transfer any property prior to that time in contemplation of death or in avoidance of taxes.

The financial division as to the testamentary heirs is as set forth below:

* * * * * * * * * * *

2. The 100 shares interest in Olympia Roofing Company, Inc., Olympia Company, Inc., and Olympia Supply, Inc., due Mary Martha Manion McLin under terms of this testament and codicils shall be purchased by William J. Manion for $20,964.

* * * * * * * * * * *

4. Upon payment to Mary Martha Manion McLin and acceptance of the sum of $53,097.59 (except Louisiana estate and transfer tax being paid by the legatees separately as their respective interest appear*) by her, William J. Manion shall be responsible for paying Federal Estate Tax and all other costs of this succession proceedings and therefore, William J. Manion shall be deemed possessor of the decedent's entire estate except the Kenner Lots, which are shared in undivided co-ownership of equal value and interest.

Net estate of decedent after taxes and cost	$107,310.18
Value of Olympia Company, Inc. stock	- 83,856.00
Plus Federal Deduction	+ 60,000.00
Subtotal	$83,454.18
1/2 total belonging to Mary Martha Manion McLin	$41,727.09
Minus 1/2 ownership of Kenner Lots	- 18,000.00
Plus William J. Manion's purchase of Olympia Co., Inc. interest	+ 20,964.00
Plus Furniture of decedent	+ 3,839.00
Plus Rugs of decedent	+ 4,567.50
	$ 53,097.59*

5. Upon accepting the terms of this succession, Mary Martha Manion McLin, her heirs and assigns shall have no interest in Olympia Roofing Company, Inc., Olympia Company, Inc., and Olympia Supply, Inc., and further, she shall be relieved of all claims and warranties as to the installation, performance and/or sales of Olympia Roofing Company, Inc., Olympia Company, Inc., and Olympia Supply, Inc., as well as any litigation past, present or future, filed or to be filed, whether Olympia be advocate or cast as a defendant.

All banks, trust companies, insurance companies, and all other persons, partnerships, unincorporated associations, or corporations having on deposit, or in their possession, or under their control any money, credits, stocks, dividends, bonds, or other property depending upon or belonging to the succession of the deceased, Martha Penn Manion Augustin, are hereby required to deliver them to the executor and heirs named above in the proportions fixed by this judgment.

JUDGMENT READ AND SIGNED in Chambers in the City of Gretna, Louisiana, this 1st day of July, 1977.

(Wallace C. LeBrun)
J U D G E